

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

AARON ROME,
Plaintiff

v.

**HCC LIFE INSURANCE COMPANY
and HCC SPECIALTY
UNDERWRITERS, INC.,**
Defendant

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CIVIL ACTION NO. 3:16-cv-02480-N

PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Aaron Rome, (hereinafter "Rome" or "Plaintiff"), Plaintiff herein, and files this *Plaintiff's First Amended Complaint*, subject to appeal of this Honorable Court's June 20, 2018 Order/Judgment regarding dismissal of Rome's original lawsuit, and without waiving same, and in support thereof would show unto this Honorable Court as follows:

**I.
PARTIES AND SERVICE OF CITATION**

1. Rome is an individual and citizen of Canada.
2. Defendant HCC Life Insurance Company ("HCC") has been served and has appeared herein. This *First Amended Complaint* is being served in accordance with the Court's Order/Judgment of June 20, 2018 and in accordance with the Federal Rules of Civil Procedure.

3. Defendant HCC Specialty Underwriters, Inc. ("HCCS") has been served and has appeared herein. This *First Amended Complaint* is being served in accordance with the Court's Order/Judgment of June 20, 2018 and in accordance with the Federal Rules of Civil Procedure.

II. JURISDICTION AND VENUE

4. The preceding paragraphs are incorporated herein by reference as if set forth verbatim.

5. Subject to the appeal of this Honorable Court's June 20, 2018 Order/Judgment and without waiving same, this Court has jurisdiction of this matter pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1332(a)(2).

6. Venue is proper in this District pursuant to 29 U.S.C. § 1132(e)(2), because both Defendants can be found in this District and because both Defendants have conceded venue is proper in the Northern District of Texas, Dallas Division.

III. FACTUAL BACKGROUND

7. The preceding paragraphs are incorporated herein by reference as if set forth verbatim.

8. Rome alleges the following facts subject to the appeal of this Honorable Court's June 20, 2018 Order/Judgment and without waiving same and/or in the alternative.

A. PROCEDURAL FACTS

9. Rome is now a retired professional hockey player. Prior to his retirement at the age of 29, Rome was a talented, skilled, dedicated, and loyal hockey player who played in the NHL for numerous seasons. In 2013, Rome sustained a career ending “acute injury” while playing for the Dallas Stars against the Saint Louis Blues in a game at the American Airlines Center in Dallas, Texas. Rome injured his left hip, ultimately requiring surgery.

10. Despite Rome’s intensive efforts at rehabilitation to get back to playing hockey in the NHL, he was unable to do so. Rome was found permanently disabled and unable to return to playing professional hockey.

11. Fortunately for Rome, he was insured by a policy of insurance issued by HCC (“the Policy”) that HCC asserts falls under ERISA, 29 U.S.C. § 1003(a)(2). In accordance with the Policy terms and to the extent it is part of an ERISA plan, Rome properly, completely, and competently complied with the Policy in making a claim for disability benefits covered by the Policy.

12. Daniel Libby (“Libby”), a person engaged in the business of insurance, and an agent for HCC and/or HCCS (collectively “the HCC Defendants”), was the adjuster assigned to handle Rome’s claim. From the outset, Libby, as agent for the HCC Defendants, was determined to look for a way to avoid paying Rome the benefits due Rome under the Policy.

13. Significantly Libby was not and is not a licensed insurance adjuster in Texas and thus was disqualified from adjusting, evaluating, and determining Rome’s

claim. In addition, Libby refused to cooperate by providing Rome all documents relating to his claim, including the determination thereof. Predictably and as Libby planned, Libby denied Rome's claim.

14. Following the denial of his compensable and covered claim, Rome requested numerous documents and information from Libby and/or the HCC Defendants, for among other reasons, Libby and/or the HCC Defendants asserted the Policy and/or Rome's claim fell under ERISA.

15. When Rome requested substantiation of ERISA's application, he was provided incomplete documents and/or information and materials that contradicted that ERISA applied. Moreover, despite repeated requests, Libby, the HCC Defendants and others refused: to provide a complete copy of the so-called ERISA Plan, as well as a proper Summary Plan Description ("SPD"); to provide the administrative record or documents that Libby and/or the HCC Defendants used or relied on in making its decision on Rome's claim; to provide the identity of any experts used or relied on to decide or determine Rome's claim; and to provide documents that are referenced in other materials furnished to Rome. If ERISA applied, Rome was undoubtedly entitled to all information/documents Rome had requested.

16. Rome's claim was allegedly denied on February 5, 2016 and he was told he had 180 days to appeal from that date under ERISA, although the Policy had no such requirement and there was no Plan document setting out this deadline. Therefore, Libby repeatedly refused to communicate, provide the administrative record for any appeal if ERISA did in fact apply, and instead asserted privilege claims on materials

Rome requested and would be entitled to if ERISA applied. Under the deadline asserted by Libby and/or the HCC Defendants, Rome had to provide notice/intent of his appeal no later than August 4, 2016.

17. On July 22, 2016, just days from the purported August 4th deadline asserted by Libby and/or the HCC Defendants and/or perhaps others, the HCC Defendants sent Rome some documents and advised Libby was no longer working for the HCC Defendants. In simple terms, after withholding documents for months – *i.e.* the so-called administrative record if Libby and the HCC Defendants are to be believed – the HCC Defendants expected Rome to prepare and file his appeal within just a few days and without being provided a proper and complete SPD and/or Plan documents including any appeal procedure and/or other significant materials if ERISA applied.

18. Rome contends that the HCC Defendants and/or Libby do not understand, grasp, and/or are incompetent in handling insurance disability claims based on ERISA, if in fact ERISA applies. Although Rome avers that the Policy is not ERISA controlled or regulated, the conduct of Libby and the HCC Defendants was not ERISA compliant.

19. On July 28, 2016, Rome notified the HCC Defendants and others that he intended to appeal the denial of his claim, that if the claim was controlled by ERISA then he should receive a complete and unredacted copy of the materials, documents, and administrative record for his claim. Rome further requested the so-called 180 day deadline be suspended until such time that the complete SPD, Plan documents, and administrative record in their entirety were provided to Rome.

20. Of the documents eventually provided to Rome, the only “Plan” is the Policy itself, a statement that one or both of the HCC Defendants will determine claims made under the Policy, and a two-page reference to Disability Insurance in a document titled “Health and Welfare Benefits Guide – Plan Highlights Summary 2013.” These documents promise a SPD will be furnished later. A two-page discussion for Disability Insurance on a document titled “Health and Benefits Plan Highlights Summary – Active Players 2014-15” was also prejudiced. This document was equally vague and incomplete. This so-called latest “Summary” states: “The above is a partial list of exclusions. A full list of exclusions and other policy terms and conditions are provided in the Summary Plan Description and the documents governing the Plan. You may contact the NHLPA for further details.” However, one or both of the HCC Defendants refused or failed to provide other materials referenced in this Summary.

21. Because of Libby and the HCC Defendants’ conduct, Rome filed suit against Libby and others in Texas State Court. This State Court lawsuit was removed to this Honorable Court.

22. Once in federal court, Rome agreed to dismiss without prejudice all Defendants except HCC. The parties agreed, in case Rome’s claim was controlled by ERISA, to abate the federal lawsuit to allow Rome to go through an administrative appeal to avoid any further delay.

23. In the interim, HCC moved to dismiss Rome’s lawsuit based on ERISA preemption.

24. The result of the administrative appeal was no different than the original decision, mimicking the initial denial. It was not clear whether one or both of the HCC Defendants relied on the same materials and physicians for both the original claim and the administrative appeal.

25. On June 20, 2018, this Honorable Court granted HCC's motion to dismiss and allowed Rome to replead.

B. SUBSTANTIVE FACTS

26. The HCC Policy was sold and issued in Texas, thereby, under Article 21.42 of the Texas Insurance Code, the Policy is controlled and governed by Texas law. This means Texas insurance law controls the Policy's interpretation.

27. Although one or both of the HCC Defendants denied Rome's claim, they (or it) conceded Rome met the Policy definition of "Total Disability."

28. The HCC Defendants contend that the Policy has certain exclusions which are unclear at best. None of the exclusionary terms are defined and the exclusionary language does not prescribe whether causes must be the sole cause or a cause for refusing coverage under the Policy.

29. The Policy language is ambiguous, including the exclusionary language, and under Texas law, all ambiguities are construed in favor of coverage and against the insurer. Further, under Texas insurance law, which controls, the burden is on the HCC Defendants to prove any exclusion applies.

30. The HCC Defendants do not establish any nexus between the exclusionary language and its denial of Rome's claim. In fact, in rejecting Rome's claim, one or both

of the HCC Defendants admit they are not competent to decide ambiguity in the Policy and therefore do not do so in deciding Rome's claim.

31. Rome's permanent disability is attributable to his 2013 injury while playing for the Dallas Stars. As all NHL hockey players are injured from time to time, many players attempt to play through their injuries. Rome did not recover from his 2013 injury, despite trying to continue to play, ultimately resulting in Rome's retirement due to his permeant and total disability.

32. The HCC Defendants have gone to great lengths to deny Rome's disability claim, relying on, at best, ambiguous exclusionary language which the HCC Defendants purposefully do not evaluate and disregarding the injury triggering event resulting in total and permanent disability.

33. To sum up, there is an insurance policy that provides coverage for Rome's compensable and valid claim. Libby and the HCC Defendants, by design, denied Rome's covered claim; the HCC Defendants and others refused to provide the documents and information relied on to deny Rome's covered claim even though the HCC Defendants contend Rome's claim is governed by ERISA; and the HCC Defendants delayed until the eleventh hour in providing the so-called "administrative record," SPD, and Plan documents to Rome. There are no "Plan" documents establishing how and who decides Rome's claims except reference to an insurance policy from a Texas insurer.

34. What has actually occurred is the HCC Defendants have deliberately sabotaged, wrongfully denied, and legally mistreated a professional athlete who gave

his heart and effort to professional hockey only to be betrayed by those who were supposed to help, protect, and provide benefits that he undoubtedly deserves. The HCC Defendants have unapologetically betrayed Rome, forcing him to seek relief in the one place where the HCC Defendants will be forced to treat Rome fairly, properly, and in accordance with applicable law.

35. Rome has exhausted all required administrative levels of appeal and complied with all requirements of any applicable administrative procedure and remedies, including all conditions precedent.

36. Rome was and is totally and permanently disabled based on the definition of total disability in the Policy.

37. The HCC Defendants operated under a conflict of interest because it is both the determiner of claims and the payer of claims. The HCC Defendants' determination of Rome's claim is not entitled to any deference.

**IV.
REQUEST FOR RELIEF - COUNT ONE
(Claim for Benefits Under the Policy)**

38. The preceding paragraphs are incorporated herein by reference as if set forth verbatim.

39. Rome is entitled to total disability benefits under the Policy because Rome has met the definition of total disability contained in the Policy. The Policy is ambiguous and must be construed in favor of Rome.

40. Rome has complied with his obligations to make proof of claim in accordance with the Policy's requirements.

41. The standard of review is *de novo* because the HCC Defendants are not granted discretion, and/or such discretion is voided by Texas law. Rome has proven by a preponderance of the evidence that Rome is entitled to total disability benefits under the Policy. The HCC Defendants' decision to deny Rome's benefits was wrong.

42. In the alternative, one or both of the HCC Defendants' decision to deny Rome's benefits was arbitrary and capricious.

43. Pursuant to 29 U.S.C. § 1132(a)(1)(B), Rome seeks from HCC benefits that have not been paid to him.

V.
REQUEST FOR RELIEF - COUNT TWO
(Attorneys' Fees Pursuant to 29 U.S.C. § 1132(g)(1))

44. The preceding paragraphs are incorporated herein by reference as if set forth verbatim.

45. Pursuant to 29 U.S.C. § 1132(g)(1), Rome seeks an award of his reasonable and necessary court costs and attorneys' fees in connection with the prosecution of this action.

VI.
PRAYER

FOR THESE REASONS, Rome requests that the Court order one or both of the HCC Defendants:

- a. to pay Rome the full benefits owed under the Policy;
- b. to pay Rome's reasonable attorney's fees incurred in pursuing recovery of benefits owed to Rome;

- c. to pay Rome pre-judgment and post-judgment interest; and
- d. that Rome recover the costs of this action and grant him such other and further relief as the Court may deem proper under the circumstances.

Respectfully submitted,

/s/Mark A. Ticer

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically by operation of the Court's electronic filing system to all counsel of record on this the 20th day of July 2018.

/s/Jennifer W. Johnson
Jennifer W. Johnson